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17 BCW DIVERSIFIED, INC., an Indiana Corporation, and ERIC BROWNELL, an  
18 individual

19 **UNITED STATES DISTRICT COURT**  
20 **CENTRAL DISTRICT OF CALIFORNIA– WESTERN DIVISION**

21 ULTRA PRO INTERNATIONAL, LLC,  
22 a Delaware Limited Liability Company

23 Plaintiff,

24 vs.

25 BCW DIVERSIFIED, INC., an Indiana  
26 Corporation, and ERIC BROWNELL, an  
27 individual

28 Defendants.

CASE NO. 2:24-cv-08467-MAA

*Assigned for All Purposes to:*  
Magistrate Judge: Maria A. Audero

**MEMORANDUM OF POINTS &  
AUTHORITIES**

**[EX PARTE APPLICATION TO  
STAY DEADLINE TO FILE  
RESPONSIVE PLEADING,  
DECLARATION OF ANDREW  
NELSON, AND [PROPOSED]  
ORDER FILED CONCURRENTLY  
HEREWITH]**

1 Defendants BCW Diversified, Inc. ("BCW") and Eric Brownell ("Brownell")  
2 (collectively, "Defendants") submit the following Memorandum of Points and Authorities  
3 in support of their Ex Parte Application to Stay Deadline to File Responsive Pleading.

4 **I. INTRODUCTION**

5 Defendants BCW Diversified, Inc. and Eric Brownell ("Defendants") seek  
6 an ex parte order staying the deadline to file a responsive pleading, currently set  
7 for November 15, 2024 for BCW Diversified, Inc. and November 18, 2024 for  
8 Eric Brownell. This stay is necessary to prevent the waste of judicial and party  
9 resources that would result from filing an answer and potential counterclaims  
10 while Defendants' potentially dispositive Motion to Dismiss is pending. The  
11 Motion to Dismiss, set for hearing on November 20, 2024, argues that this action  
12 should be dismissed or transferred based on a prior pending action in the Southern  
13 District of Indiana. Given the strong likelihood that the Motion to Dismiss will be  
14 granted, particularly in light of Plaintiff's failure to oppose the motion, requiring  
15 Defendants to file responsive pleadings mere days before the hearing would be an  
16 exercise in futility and an unnecessary expenditure of resources.

17 **II. FACTUAL BACKGROUND**

18 This action is the latest in a series of related lawsuits between the parties:

19 1. On June 6, 2024, Plaintiff Ultra Pro International, LLC ("Ultra Pro")  
20 filed a trademark infringement suit against BCW in the Northern District of  
21 Illinois. Ultra Pro voluntarily dismissed that action on September 26, 2024, after  
22 BCW moved to transfer the case to Indiana.

23 2. On August 14, 2024, Ultra Pro filed another suit in the Northern  
24 District of Illinois against 133 of BCW's customers, alleging trademark  
25 infringement for selling BCW's products. Ultra Pro subsequently dismissed 132  
26 of the 133 defendants.

27 3. On September 30, 2024, BCW filed a declaratory judgment action  
28

1 against Ultra Pro in the Southern District of Indiana, seeking a ruling on the  
2 validity and non-infringement of Ultra Pro's alleged trademarks.

3 4. On October 2, 2024, Ultra Pro filed the instant action in this Court,  
4 once again alleging trademark infringement against BCW and its President, Eric  
5 Brownell.

6 5. On October 22, 2024, Defendants filed a Motion to Dismiss or  
7 Transfer this action, set for hearing on November 20, 2024. The motion argues  
8 that this action should be dismissed pursuant to Fed.R.Civ.P. 13(a) and 28  
9 U.S.C.A. § 1404(a) on the grounds that Plaintiff's claims in the instant action are  
10 compulsory counterclaims in the Indiana Action, and the Indiana Action is the  
11 prior pending action.

12 6. The deadline for Plaintiff to file an opposition to Defendants' Motion  
13 to Dismiss was October 30, 2024. Plaintiff failed to file any opposition by this  
14 deadline.

15 7. On November 12, 2024, Defendants filed a Notice of Non-Opposition  
16 (Docket 37) to their Motion to Dismiss, highlighting Plaintiff's failure to oppose  
17 and citing Local Rule 7-12 of the Central District of California, which states: "The  
18 failure to file any required document, or the failure to file it within the deadline,  
19 may be deemed consent to the granting or denial of the motion."

20 8. The current deadlines for Defendants to file responsive pleadings are  
21 November 15, 2024 for BCW Diversified, Inc. and November 18, 2024 for Eric  
22 Brownell.

23 9. As detailed in the accompanying Declaration of Andrew Nelson,  
24 Defendants' counsel made extensive efforts to meet and confer with Plaintiff's  
25 counsel regarding a stipulated extension of the responsive pleading deadline, as  
26 required by Local Rule 7-3. These efforts included:

27 a. A detailed voicemail left for Plaintiff's counsel, Kevin Keener,  
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1 on October 23, 2024.

2 b. A follow-up email sent on October 25, 2024, proposing either a  
3 stay or a second stipulation to extend the responsive pleading deadline.

4 c. Additional follow-up emails sent on October 29, October 31,  
5 November 1, November 4, 2024 and November 12, 2024.

6 d. A voicemail left on November 5, 2024, reminding Mr. Keener  
7 of the need to confer under the local rules.

8 10. Despite these repeated attempts over a two-week period, Plaintiff's  
9 counsel provided only a single response indicating a date to talk, but did not  
10 engage in substantive discussions about the proposed extension or stay. (Nelson  
11 Decl., ¶¶ 5, 6 and Exh. A)

12 11. Given the lack of substantive response from Plaintiff's counsel,  
13 Plaintiff's failure to oppose the Motion to Dismiss, and the rapidly approaching  
14 deadline for filing responsive pleadings, Defendants were compelled to seek ex  
15 parte relief from this Court.

16 **III. ARGUMENT**

17 **A. GOOD CAUSE EXISTS FOR GRANTING THE EX PARTE**  
18 **APPLICATION**

19 **1. Strong Likelihood of Success on the Motion to Dismiss**

20 Defendants' Motion to Dismiss, filed on October 22, 2024, has a strong  
21 likelihood of success. The motion argues that this action should be dismissed or  
22 transferred based on the prior pending action in Indiana and the first-to-file rule.  
23 The Indiana action, filed on September 30, 2024, involves the same parties and  
24 substantially the same issues as this case. Under the first-to-file rule and principles  
25 of judicial economy, this later-filed action should not proceed in this Court.

26 Moreover, Plaintiff's failure to file any opposition to the Motion to Dismiss  
27 significantly strengthens the likelihood of success. Local Rule 7-12 of the Central  
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District of California provides that failure to file a required document within the deadline "may be deemed consent to the granting or denial of the motion." Given Plaintiff's non-opposition, the Court may reasonably deem this as consent to granting Defendants' Motion to Dismiss.

## **2. Filing Responsive Pleadings Would Be Futile and Wasteful**

Requiring Defendants to file an answer and potential counterclaims mere days before the hearing on the Motion to Dismiss would be an exercise in futility. If the Motion to Dismiss is granted, any responsive pleadings filed would become moot. This would waste not only the parties' resources in preparing these pleadings but also the Court's resources in processing them. Moreover, if the case is transferred to Indiana, any counterclaims filed here would likely need to be refiled or amended in that forum.

## **3. No Prejudice to Plaintiff**

A brief stay of the responsive pleading deadline until after the Court rules on the Motion to Dismiss will not prejudice Ultra Pro. The motion hearing is set for November 20, 2024, just days after the current responsive pleading deadlines. Given the extensive litigation history between the parties and Plaintiff's own failure to oppose the Motion to Dismiss, a short delay will not impact Ultra Pro's ability to pursue its claims, should the case proceed in this Court.

## **B. THE EX PARTE APPLICATION COMPLIES WITH RULES GOVERNING EX PARTE APPLICATIONS**

This ex parte application fully complies with the rules governing such applications in the Central District of California:

**1. Notice:** As required by Local Rule 7-19, Defendants' counsel provided notice of this ex parte application to Plaintiff's counsel on November 12, 2024, via email. (Nelson Decl., ¶ 8). The notice included the date, time, and place of the ex parte application, as well as the nature of the order to be requested.

1 (Nelson Decl., ¶ 9).

2           **2. Attempt to Determine Opposition:** In the notice email,  
3 Defendants' counsel requested that Plaintiff's counsel inform Defendants whether  
4 Plaintiff will oppose the application. (Nelson Decl., ¶ 9). As of the filing of this  
5 application, Plaintiff has not indicated whether they will oppose. (Nelson Decl., ¶  
6 10).

7           **3. Declaration Regarding Notice:** The accompanying  
8 Declaration of Andrew Nelson includes all information required by Local Rule 7-  
9 19.1, including the date, time, and manner of notice, the relief sought, any response,  
10 and whether opposition is expected. (Nelson Decl., ¶¶ 8, 9, Exh. A).

11           **4. Showing of Irreparable Prejudice:** This application  
12 demonstrates that Defendants will suffer irreparable prejudice if required to file  
13 responsive pleadings before the Court rules on the Motion to Dismiss. The  
14 potential waste of resources and the filing of potentially moot pleadings constitute  
15 irreparable prejudice justifying ex parte relief.

16           **5. Explanation of Urgency:** The urgency of this application is  
17 clear from the impending responsive pleading deadlines (November 15 and 18,  
18 2024) and the hearing date for the Motion to Dismiss (November 20, 2024). The  
19 short time between these dates necessitates immediate action by the Court to  
20 prevent the waste of resources.

21 **IV. CONCLUSION**

22           For the foregoing reasons, Defendants respectfully request that the Court  
23 grant this Ex Parte Application and stay the deadline for filing a responsive  
24 pleading pending the Court's ruling on the Motion to Dismiss. This brief stay will  
25 conserve judicial and party resources and prevent the needless filing of potentially  
26 moot pleadings.

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Respectfully Submitted,

DATED: November 12, 2024

FORWARD COUNSEL LLP

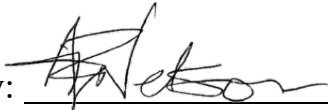
By: 

Andrew R. Nelson

Attorney for Defendants BCW DIVERSIFIED,  
INC., and ERIC BROWNELL

**CERTIFICATE OF SERVICE**

I hereby certify that on November 12, 2024, I electronically filed the foregoing document with the Clerk of the Court using the Court's CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

By:   
\_\_\_\_\_  
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